J & C NEW POLY CATERING SDN BHD

v.

TTMP BAKUN CONSORTIUM SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ RAHIM J
[SUIT NO: 22-22-2005 (MR)]
21 JULY 2005

CIVIL PROCEDURE: *Parties - Locus standi - Application for ex parte interim injunction to restrain first garnishee from complying with garnishment order - Affidavit in support of application filed by a mere shareholder in company - Whether shareholder applicant had locus standi to move court for injunction on behalf of defendant*

On 5 July 2005, the defendant applied by summons-in-chambers (encl. 25) and on an urgency certificate for an *ex parte* interim injunction to restrain the first garnishee ('the garnishee') from complying with the garnishment order absolute dated 22 June 2005('the order') obtained by the plaintiff against the garnishee ordering the garnishee to pay the plaintiff the sum of RM604,796.93 kept in the defendant's current account with the garnishee's bank. The defendant's *ex parte* application was supported by an affidavit by one Udam @ George Adam Talek affirmed on 1 July 2005 ('Udam's affidavit.') It was averred in Udam's affidavit-in-support that the order ought to be set aside *ex debition justitiae* because it was obtained based on irregular default judgment and that the money which the order sought to attach and which was kept in the defendant's current account with the first garnishee was not a debt owing from the first garnishee bank to the defendant. On the facts deposed in Udam's affidavit-in-support and on the defendant's counsel certificate of urgency, the court granted the *ex parte* interim injunction order to the defendant. At the *inter partes* hearing of the defendant's application on 14 July 2005, the director of the plaintiff, one Chen Thian Lin in his affidavit ('Chen's affidavit') averred that the deponent, Udam, had no authority or *locus standi* and had no personal knowledge of the matters deposed of in his affidavit.

Held (discharging *ex parte* injunction):

[1] From the affidavit of Udam, it was obvious that he was the applicant to set aside the garnishee order. But, it had been shown that he was only a shareholder. It was also not in dispute that the money that was the subject matter of the garnishee order belonged to the defendant company, not

Udam, thus it was the company's property. Udam had no *locus standi* to move the court for the injunction on behalf of the defendant. Therefore, the court discharged the *ex parte* injunction granted on 5 July 2005. (p 852 e-g)

[Cost of this application to plaintiff.]

Case(s) referred to:

Bina Satu Sdn Bhd v. Tan Construction [1988] 1 MLJ 533 ***(refd)***

Cotton Corp of India v. United Industrial Bank AIR [1983] SC 1272 ***(refd)***

First Consolidated Sdn Bhd v. Padu Ehsan Sdn Bhd & Anor And Another Suit [1994] 4 CLJ 668 HC ***(refd)***

Hong Kong and Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1986] 2 MLJ 86 ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445 ***(refd)***

Malaysia Land Investment Co (Pte) Ltd v. Sathask Realty Sdn Bhd & Ors [2001] 1 MLJ 451 ***(refd)***

Oversea Chinese Banking Corp Ltd v. Sindoma Realty Sdn Bhd & Other Applications [1989] 1 MLJ 377 ***(refd)***

Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***

Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd [1998] 4 CLJ 293 CA ***(refd)***

United Investment and Finance Ltd v. Tee Chin Yong & Ors [1967] 1 MLJ 31 ***(refd)***

United Malayan Banking Corp Bhd v. Syarikat Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546 ***(refd)***

United Overseas Bank Ltd v. Chung Khiaw Bank Ltd [1968] 2 MLJ 85 ***(refd)***

Woolux Sdn Bhd & Anor v. TTMP Bakun Consortium Sdn Bhd (Suit No: 22-60-2004) (Unreported) ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 4(2), O. 29 r. 1, O. 32 r. 6, O. 49, O. 56

Specific Relief Act 1950, s. 54(b)

Civil Procedure [India], O. XXXIX r. 2

Specific Relief Act 1963 [India], ss. 41(b), 56(b)

Other source(s) referred to:

Nelson's Law of Injunctions, 4th edn, 2003, pp 658, 660

For the plaintiff/judgment creditor - Shankar Ram (Keith Chin with him); M/s Thomas, Shankar Ram & Co
For the defendant/judgment debtor - KY Lin (Rajesh Jethi with him); M/s Kadir Wong Lin & Co
For the 1st garnishee - ST Lau; M/s David Allan Sagah & Teng

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Rahim J:

On 5 July 2005 the defendant applied by summons-in-chambers (encl. 25) and on an urgency certificate for an *ex parte* interim injunction to restrain the first garnishee ('the garnishee') from complying with the Garnishment Order absolute dated 22 June 2005 ('the order') obtained by the plaintiff against the garnishee ordering the garnishee to pay the plaintiff the sum of RM604,796.93 kept in the defendant's current account with the garnishee's bank at Bintulu.

The defendant's *ex parte* application is supported by an affidavit by Udam @ George Adam Talek affirmed on 1 July 2005 ('Udam's affidavit).

In its *ex parte* application the defendant stated two main grounds. Firstly the defendant has serious triable issues in its application to set aside the default judgment dated 23 April 2005 (including setting aside the service of the plaintiff's writ of summons) obtained by the plaintiff against the defendant; and which formed the basis for the order. In relation to the first ground the defendant also says that it has a defence on the merits. In particular, the defendant says that the service of the writ on defendant on the defendant's registered office at Lot 1070, 2nd floor, Jalan Bintang Jaya 1, Bintang Jaya Commercial Centre Miri, was irregular as the said office was deserted and untenanted at the time of service and that this fact was known to the plaintiff's advocates at all material times. The defendant also says that from the sum of RM593,626.06 claimed by the plaintiff in its statement of claim, the claim for the sum of RM413,626.06 is suspicious or non-existence because the plaintiff had pleaded under para. 4 of its statement of claim that the defendant had promised to pay that sum to the plaintiff on or before 31 October 2004; but the defendant says the invoices that supported the claim were only issued in 2005. The defendant also contends that another claim by the plaintiff that is the sum of RM180,000 which the plaintiff claimed to have been loaned to the defendant is also suspicious or non existence because the defendant was only incorporated on 15 April 2004 whereas the said sum of RM180,000 was said to have been loaned by the plaintiff to the defendant in October 2003; that is before the defendant was incorporated.

The second ground forwarded by the defendant is that the defendant has serious triable issues in respect of its application to set aside the order. The defendant contends that the order ought to be set aside *ex debito justitae* because it was based on an irregular default judgment and also because the defendant has a defence on merits against the plaintiff's claim. The defendant also contends, as regard the order, that the plaintiff in law cannot attach the defendant's money kept in a bank account belonging to the defendant because it is not a debt owing from the bank to the defendant.

In Udam's affidavit in support of the defendant's application, the deponent deposed that he is one of the shareholders in the defendant's company and that the matters deposed in the affidavit are within his personal knowledge and that the information are obtained from the files, document or records in his possessions or to which he has had access to. At this juncture it is to be noted that nowhere in the affidavit did the deponent affirmed that he is deposing the facts in the affidavits on behalf of the defendant company or that he has the authority or had been so authorized to affirm that affidavit. It is also pertinent to note that in para. 2 of Udam's affidavit he has deposed as follows:

> I affirm this affidavit pursuant to the provision of Order 29 rule 1(2A) Rules of the High Court 1980 and in support of my application for *ex parte* order for an interim injunction against the abovenamed 1st garnishee ...

I am drawing attention to this fact in Udam's affidavit because at the *inter partes* hearing of the defendant's application on 14 July 2005 at Bintulu High Court, the parties having consented to it, counsel for the plaintiff raised the issue of Udam George Talek authority to make the application on behalf of the defendant's company. Instead learned counsel for the plaintiff submitted that Udam George Talek filed the *ex parte* application on his own behalf. I will return to this point in the latter part of this judgment.

In para. 4 of Udam's affidavit in support, the deponent Udam @ George Adam Talek said that he was contacted by the Branch Manager of the 1st garnishee that the plaintiff has obtained an absolute garnishee Order dated 22 June 2005 against the defendant to garnish the sum of RM604,796.93 that is deposited under the defendant's Current Account No. 5-11065-552215-9 with the 1st garnishee and the sealed copy of the order has been served on the 1st garnishee's advocates. The deponent also deposed in para. 5 of his affidavit that the same Branch Manager had informed him that the 1st garnishee would abide by the said order unless there is a court order restraining the 1st garnishee from paying, disbursing or releasing the said sum to the plaintiff. He also affirmed in the affidavit that upon being informed of the matter he

immediately appointed Messrs. Kadir, Wong, Lin & Co Miri to enter appearance for the defendant 'in this suit'; and this was accordingly done by Messrs. Kadir, Wong, Lin & Co. on 27 June 2005. In the same paragraph the deponent said that he was advised by his advocates that an interim injunction is necessary to restrain the 1st garnishee from releasing the said sum of money to the plaintiff pending the defendant's application to set aside the judgment in default and the order obtained by the plaintiff against the defendant. In para. 9 of his affidavit in support of the *ex parte* application, Udam deposed that he had been advised by his advocates that the default judgment against the defendant ought to be set aside as the service of the plaintiff's writ of summons on the defendant is irregular and that the defendant has a defence on merit against the plaintiff's claim.

As to the irregularity of the service of the plaintiff's writ of summons on the defendant, Udam deposed in para. 10 of his affidavit in support that the plaintiff's advocates, Messrs. Suhaili Bong advocates, who acted for the plaintiff in this suit also acted for the defendant in another suit filed in the High Court at Miri that is Suit No. 22-60-2004 (MR) between *Woolux Sdn Bhd & Anor v. TTMP Bakun Consortium Sdn Bhd.* The suit is currently ongoing. Udam also said in his affidavit that Messrs. Suhaili Bong Advocates was appointed by on Abdul Majid Rana, the director of the defendant, to act for the defendant in that suit. It was contended in the same paragraph of Udam's affidavit that because of this fact Messrs. Suhaili Bong advocates, who was acting for the plaintiff in this suit (Note: at the *inter partes* hearing of the defendant's interim injunction application the plaintiff had filed a notice of change of solicitors and appointed Thomas, Shankar Ram & Co., Advocates to act on its behalf in this suit, replacing Messrs. Suhaili Bong Advocates) has knowledge of the internal working arrangement of the defendant and was aware that the defendant's registered office at Lot 1070, 2nd floor, Jalan Bintang Jaya 1, Bintang Jaya Commercial Center, Miri was unmanned, deserted and untenanted. Therefore it was contended that when the then plaintiff's advocates Messrs. Suhaili Bong Advocates served the writ of summons on the defendant on 11 April 2004 at the defendant's registered office at Bintang Jaya Commercial Centre the then plaintiff's advocate knew that the defendant's registered office was closed. Accordingly it was contended that the plaintiff had acted *mala fide* and had abused the court's rules relating to the service of the plaintiff's claim against the defendant. Udam further deposed in para. 12 of his affidavit that at all material times he was based in Kuching; and that he and the directors of the defendant could not have possibly learnt of the plaintiff's claim.

As to the defence on merits, the facts are deposed in para. 14 of Udam's affidavit. It was affirmed that the total claim by the plaintiff against the defendant is RM593,626.06. However this sum, it is said in the affidavit, is suspicious. It was said in the same paragraph of the affidavit that the plaintiff had claimed that the defendant had promised to pay RM413,626.06 of the total sum claimed on or before 31 October 2004. But the invoices for this amount were only issued in 2005. So the deponent contends that it is not possible for the defendant to make a promise to the plaintiff to pay for a debt which is not even in existence then. It must be noted that the invoices were not exhibited in Udam's affidavit; but the plaintiff had particularized the invoices in para. 2 of its statement of claim.

Paragraph 14(iii) of Udam's affidavit also contains averment that the sum RM180,000 (which is the other part of the total sum) claimed by the plaintiff in para. 3 of its statement of claim is also suspicious. Udam deposed that the plaintiff has alleged in its statement of claim that the said sum was advanced to the defendant in as capital sum and loaned to the defendant in October 2003. But, Udam said in his affidavit, the defendant was only incorporated on 15 April 2004. So it is contended that the claim as to the advance of the capital sum of RM180,000 is suspicious, flawed and defective because the advance or loan was made to a non existence company then – the defendant was not yet incorporated in 2003. The evidence of the date of the defendant incorporation is exhibited in exh. 'GAT1', a copy of the company search conducted on the defendant on 30 June 2005, in Udam's affidavit in support.

As regard the merits of the application to set aside the order against the 1st garnishee, it was averred in Udam's affidavit in support, at para. 15 that the order also ought to be set aside *ex-debito justitiae* because the order was obtained based on irregular default judgment and that the money which the order seeks to attach and which is kept in the defendant's current account with the 1st garnishee is not a debt owing from the 1st garnishee bank to the defendant.

On the facts deposed in Udam's affidavit in support and on the defendant's counsel certificate of urgency I granted the *ex-parte* interim injunction order to the defendant on 5 July 2005. For the record however, I did, at the hearing of the *ex parte* application, indicated to the defendant's solicitors that I would prefer to have the matter heard *inter partes* because the garnishee order was already made absolute. But the learned counsel for the defendant urged the court to hear the application *ex parte* because of the urgency of the matter. The urgency of the application was averred to in paras. 18 to 23 of Udam's affidavit.

At the *inter partes* hearing of the defendant's application on 14 July 2005 at Bintulu High Court, the plaintiff was represented by a new legal firm. The plaintiff also had filed and affidavit in opposition (1) affirmed by Chen Thian Lin, the director of the plaintiff, on 11 July 2005 ('Chen's affidavit'). In his affidavit, Chen said that the defendant *ex parte* application is bad in law and in breach of O. 29 r. 1 RHC 1980 and s. 54 of the Specific Relief Act 1950. It was also averred that there was no real sense of urgency for the application and the defendant or its solicitor ought to have notified the plaintiff of the application. Chen also affirmed that Udam's affidavit in support of the defendant's *ex parte* application is bad in law as it contains baseless allegations and the deponent, Udam, has no authority or *locus standi* and has no personal knowledge of the matters deposed of in his affidavit. It was also averred in para. 6 of Chen's affidavit that the plaintiff's writ of summons and statement of claim were duly served on the defendant at the defendant registered address at Lot 1070, 2nd floor, Jalan Bintang Jaya 1, Bintang Jaya Commercial Center Miri by the process server Ahmad Zaini bin Zaidin on 11 April 2005 at about 2.30pm. The said Ahmad Zaini had also affirmed an affidavit of service dated 12 April 2005 – see encl. (4). A copy of the extract search from the Registrar of Companies at Kuching obtained on 8 July 2005 is exhibited as exh. 'CTL1' to Chen's affidavit to show that the defendant's registered address is as stated above and have not changed at the time the service of the writ and the statement of claim were effected on the defendant. Chen also averred in his affidavit of opposition (1) that Udam @ George Adam Talek knew about the ongoing court proceedings against the defendant. As evidence of this knowledge Chen exhibited in his affidavit exh. 'CTL2' which is a photocopy of the letter dated 8 Jun 2005 that Udam @ George Adam Talek wrote to the deputy registrar of the High Court at Miri about the proceedings in this case. In para. 12 of his affidavit in opposition (1) Chen also deposed that Udam @ George Adam Talek had not made frank and full disclosure of the material fact at the hearing of the *ex parte* application in that he had failed to disclose to the court that he was removed as director of the defendant by the Board of Directors Mr. Majid Rana and Mr. Han Yee Kwang. This fact as to the removal of Udam as the Director of the defendant is contained in the minutes of the extraordinary general meeting of the defendant company held on 17 September 2004. A copy of the minutes of this meeting is exhibited as exh. 'CTL3' in Chen's affidavit.

Chen also said in para. 15 of his affidavit that to the date of his affirmation of the affidavit the sealed copy of the *ex parte* summons in chambers and the *ex parte* injunction have not been served on the plaintiff's advocates. The plaintiff's advocates have to conduct a file search at the Miri High Court and obtained copies of the summons and the injunction order from the court's file.

It was alleged that the defendant's advocates have further failed to disclose to the court that they have been notified about the positions taken by the plaintiff that is the court has no jurisdiction to grant the injunction.

On the above circumstances, learned counsel for the plaintiff make the following submissions at the hearing of the *inter partes* injunction.

The first submission is that the court has no jurisdiction to grant the injunction. Learned counsel refers the court to s. 54(b) of the Specific Relief Act 1950 ('the Act') which provides that an injunction cannot be granted – '(b) to stay proceedings in a court not subordinate to that from which the injunction is sought;'. In relation to this he cited the case of *Bina Satu Sdn Bhd v. Tan Construction* [1988] 1 MLJ 533. In that case the court was invited to consider whether s. 54(b) of the Act has the effect of excluding or watering down the court's inherent jurisdiction to grant an order restraining the abuse of its process. Having considered the relevant provisions of the Act and the authorities referred to it on the point as well as the Indian decision of *Cotton Corp of India v. United Industrial Bank* AIR [1983] SC 1272 which discussed the effect of the old s. 56(b) and the new s. 41(b) of the Indian Specific Relief Act 1963 that is in *pari materia* with our s. 54(b) of the Act, the Court held that 'both by inherent powers and by administrative rules, the high court may interfere with the proceedings of the subordinate courts but it may not stay proceedings of a court superior or even of co-ordinate jurisdiction to it. In the same passage of the judgment (see p. 535 left column paras. d to g) the same court went on to hold that, following the learned judge view in the *Cotton* case and the view of other Indian judges on the old s. 56(b) of the Indian Specific Relief Act 1963 in that that section has reference to an injunction imposed on the other court and not in respect of an injunction on the parties to the litigation or intended litigation, our s. 54(b) of the Act, which is in *pari materia* with old or repealed s. 56(b) of its Indian counterpart, should be interpreted in the same way. What this means is that the court in *Bina Satu* case accepted the view that under s. 54(b) of the Act, a High Court may interfere with the proceedings of a court subordinate to it but may not do so as regards to a proceeding in another High Court or in a court superior to it; and that under the same section a High Court cannot issue an injunction to restrain another court but may issue injunction to restrain parties to a litigation or intended litigation.

The holding in *Bina Satu* on this point was followed by other High Court in later cases. (See *Oversea Chinese Banking Corp. Ltd v. Sindoma Realty Sdn Bhd and Other Applications* [1989] 1 MLJ 377).

Counsel for the plaintiffs also cited a number of Court of Appeal decisions on the same point. The first case is *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors.* [1995] 1 CLJ 293 where the court held that both cases of *Tan Suan Choo* and *Bina Satu (supra)* correctly state the law on the injunction. The second case is *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 where the court held that, after having regards to the decisions in *Tan Suan Choo, Bina Satu* and its own decision in *Keet Gerald*, the authorities do not authorize one branch of the High Court to interfere with the proceedings properly seized by another branch of the High Court. *Jasa Keramat (supra)* also approved and affirmed the cases of *Tan Suan Choo* and *Bina Satu* as authorities for the proposition that s. 54(b) of the Act prohibits the grant of an injunction to stay proceedings in a court of a co-ordinate jurisdiction and that that section deals only with permanent not temporary injunction; but that section also does not bar the grant of injunction against a party to the action as opposed to one directed against the court.

Learned counsel for the defendant on the other hand submitted that I have the jurisdiction to grant the injunction even though in this case the order had already been made absolute. He argued that the injunction is only an interim injunction and that there are authorities which show the court may set aside a garnishee order which had been made absolute. As to the latter he referred the court to several cases. The first case is *Hong Kong and Shanghai Banking Corporation v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86, a decision of a Singapore High Court. In that case the court set aside, on appeal by the judgment debtor, a garnishee order absolute and ruled, *inter alia*, that the court can hear judgment debtor's application under its inherent powers and make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The second case is *First Consolidated Sdn Bhd v. Padu Ehsan Sdn Bhd & Anor and Another Suit* [1994] 4 CLJ 668. There the issue was whether the deputy registrar was *functus officio* after she had made the garnishee order absolute and therefore cannot review the order on application by the garnishee to set aside the order. It was argued in that case the garnishee order absolute made by the deputy registrar was a final order and therefore the deputy registrar was *functus officio* and cannot review the order. On appeal by the garnishee on the deputy registrar refusal to review the order and dismissing the garnishee's application to set aside the garnishee order, the court held, allowing the appeal, that the deputy registrar, on the facts and circumstances of the case, was not *functus officio* and had the jurisdiction to review her own orders. At p. 670 of the report the court said as follows:

by virtue of the view that I take on the facts as disclosed in the affidavits and the notes of the proceedings, it seems clear to me that the hearing in the absence of the garnishee's counsel and its witness is an *ex parte* hearing and the order made on such a hearing was an *ex parte* order even though the application so heard is not an *ex parte* application. As I am of the view that it was an *ex parte* order the court has jurisdiction by O. 32 r. 6 of the Rules of the High Court 1980 to set it aside (see *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd.; garnishee)* [1990] 1 MLJ 445). In the circumstances, I am of the view that the Deputy Registrar erred in ruling that she was functus officio and no longer has jurisdiction to entertain the sic (encl. 251).

Further, even assuming O. 32 r. 6 is not applicable in an O. 49 situation, the Court is entitled to invoke its inherent jurisdiction powers under O. 92 to prevent injustice ...

In that same case the court expressed approval and agreed with the views of the learned Mr. Justice VC George in *Loo Chay Meng*, *supra,* that 'if O. 32 r. 6 cannot be applied in an O. 49 situation, then we have a situation of 'a lacuna in the face of the rules which causes a procedural injustice in that it cannot be said that the' rules contain provision making available sufficient remedies'. In my judgment, in that kind of situation and if there is injustice, the court is not only entitled to but is obliged to make any order as may be necessary to prevent the injustice'.

As regard to the granting of the interim injunction, learned counsel for the defendant refers passages in *Nelson's Law of Injunctions*, 4th edn., 2003 published by Law Publishers (India) Pvt Ltd., and submitted that the court has the power to grant interim injunction to stay or restrain another High Court order. The first passage relied on by the defendant is found at p. 658 of the works and it reads:

it is not correct to say that under Order XXXIX, rule 2 the Court would lose the jurisdiction once it is shown that defendant had obtained an earlier decree and was proceeding with execution. The word "injury" used by rule 2 is to be understood with respect to the right and remedy sought by the plaintiff. Only because a defendant is a decree-holder, it does not follow that the plaintiff is not entitled to complain about an injury which calls for protection from the Court in a suit. Cases can be conceived where the defendant is armed with decrees which are nullities or obtained upon fraud or mischief or which are not binding on the rights or interests of the plaintiff for any reason. It is not necessary to make an exhaustive detail on the topic for suffice it to say that even under the provisions of Sec. 44 of the Evidence Act, a party has been expressly permitted to set up the invalidities of certain judgments and decrees under specified circumstances. It is, therefore, not an adequate reason to hold that only by the fact that a defendant happens to be a decree-holder and further by the fact that

a he seeks to execute the same the Courts are left without authority contemplated by Order XXXIX, rule 2 of the Code which is not exhaustive provision in the matters of grant of injunction.

The second passage relied on by the defendant is found at p. 660 of the same works and it reads:

b the courts have fall and eminent jurisdiction to grant relief of injunctions upon proper case being made out though terms of Order XXXIX might not be directly answered in *Manohar Lal Chopra v. Rai Bahadur Tao Raja Seth Hiralal.* The word "injury" used by rule 2 is to be understood with respect to the right and remedy sought by the plaintiff. Only because a defendant is a decree holder, it c does not follow that the plaintiff is not entitled to complain about an injury which calls for protection from the court in a suit. Cases can be conceived where the defendant is armed without decrees which are nullities or obtained upon fraud or mischief for which are not binding on the rights or interests of the plaintiff for any reasons. It is not necessary to make an exhaustive detail on the topic, for suffice it to say that even under the provisions of Sec. 44 of the Evidence d Act, a party has been expressly permitted to set up the invalidities of certain judgments and decrees under specified circumstances. It is, therefore, not an adequate reason to hold that only by the fact that a defendant happens to be a decree-holder and further by the fact hat he seeks to execute the same the Courts are left without authority contemplated by Order XXXIX, rule 2, of the Code e which is not exhaustive provision in the matters of grant of injunction. The word "injury" is of a very wide import and means, a wrong, damage or harm. So wherever the complaint is that the defendant either at the foot of a decree or otherwise is trying to cause damage or wrong to the right under adjudication of the plaintiff, the matter requires to be examined on its own merit.

f It may be noted however that in the passages referred to, in fact throughout the whole extract of passages from the above works, from pp. 657 to 661, p. 664, p. 1115 and pp. 1120 and 1121, the discussion relates to the application and effect of the provision O. XXXIX r. 2 of the Indian Civil Procedure Code which empowers the courts in India to grant a temporary injunction restraining g a defendant from committing breach of contract or 'other injury of any kind'. (See p. 658 of the works). When questioned by the court, learned counsel for the defendant conceded that there is no equivalent of the Indian Civil Procedure Code O. XXXIX r. 2 in our Specific Relief Act 1953 or any other written law. Therefore in my view the above passages relied on by the defendant's counsel must be applied with caution. Furthermore, there are h passages in the same works that may suggest that generally an injunction cannot be issued to stop an execution of a decree. For example the passages at pp. 657 and 658 and also at p. 1120 of the works. These passages appear below:

i

At pp. 657 and 658 the passages read:

80. Execution of decree – jurisdiction of court to issue temporary injunction – It has been ruled in some decisions that the temporary injunction staying the execution of a decree proceedings may be granted under the inherent powers of the Court under Sec. 151, CPC.

The reason for holding this view is not very dearly stated in that judgment and it appears to be opposed to the principles adopted by a Full Bench of the Madras High Court in *Neelaveni v. Naryana Reddi followed in Krishnamwwamy v. Chengalraya* and in the case of *Joshi Shib Prakash v. Jhenguria.* The principle there laid down is that when the Code makes provision for a certain procedure the Code must be deemed to be exhaustive in that respect and the provisions of s. 151 cannot be invoked in opposition to these provision. The Code lays down in s. 94 the Court shall only have power if it is given by rules framed under the Code. It, therefore, seems impossible to hold that when rules have been framed to give the court power, further power should be given by s. 151.

At p. 1120 the passages read:

according to rule 1 of Order XXXIX, Civil Procedure Code it is for the person applying for injunction to satisfy the Court that the property in respect of which the injunction is asked for is in danger of being "wrongfully" sold in execution of a decree. A decree-holder has enough hurdles to cross before he can get his decree and no Court should lightly prevent its execution merely on the much abused ground of balance of convenience. It is the Court's duty before interfering with the decree-holder's statutory right to realize the fruits of his decree to be satisfied that conditions requisite for such interference are strictly fulfilled.

It has been consistently held by the Madras High Court that taking execution of a subsisting decree does not amount to an injury within the meaning of Order XXXIX, r. 2. In *Nasarvanji Cowasji v. Shahazadi Begam*, also it was held that a rightful execution of a decree cannot be prevented by a temporary injunction. The Court entirely agrees with the view expressed in these cases.

As already held in *Hariram v. Mohanlal*, and in *Jaswant Singh v. Sura*, no order of injunction can be made under Order XXXIX, rule 1 or rule 2 or under s. 151 to restrain a decree-holder from executing a decree in his favour so long as the decree stands and that merely because the plaintiff has brought an action for setting aside the decree and that he hopes to succeed in the suit, it cannot be held that the execution of the decree would amount to an injury. On the basis of these decisions the applicant is clearly not entitled to any order of temporary injunction restraining the non-applicants from executing their decree.

It appears to me that, from the authorities referred to, the general rule is that a High Court would not issue an injunction to restrain the execution of another High Court order. However the authorities also seem to suggest that the High Court is always seize of inherent jurisdiction to do justice in each case that comes before it. If there is apparent on the face of the records and if it so on the facts and circumstance of the case that injustice is being perpetrated in the case I do not think the court should sit quietly and let the injustice prevail. In such a situation, I think the court may fall on its inherent powers to correct the injustice, unless there is a clear statutory provision that restrain the court from exercising its discretion in such a situation pursuant to its inherent powers. If the passages from *Nelson's Law of Injunctions* that have been referred to, are of any assistance on this issue, even in India an interim injunction could be issued to restrain execution of a decree if it can be shown that the execution would result in an injury to the party against whom the execution is directed or if it can be shown that the decree was obtained by fraud.

Another reason suggested by the learned counsel for the defendant as to why this court should intervene in this instant case and restrain the plaintiff from executing the order is that default judgment and the order were obtained *ex parte* and they were *ex parte* orders though the application, in respect of the order, was *inter partes* application. As such it was submitted that the orders were liable to be set aside on application by the defendant. (See *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445; *United Malayan Banking Corp Bhd v. Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546; *United Overseas Bank Ltd v. Chung Khiaw Bank Ltd* [1968] 2 MLJ 85).

I also will take judicial notice that as a matter of practice applications for garnishee order are made before the SAR or DR. The decision of the SAR and DR is appealable to a judge in chambers. This is provided for under O. 56 of the Rules of the High Court 1980. If the decision is appealable to a judge in chambers, it is my view then that the judge can review the SAR or DR decision and if the circumstances warrant it, can even order a stay of the order. In holding this view, and in relation to the issue of the High Court jurisdiction to issue a restraining order against another High Court Order, I am mindful of the definition of 'court' in O. 1 r. 4(2) of the Rules of the High Court 1980 which says that 'court' means 'the High Court or any one or more judges thereof, whether sitting in court or in chambers, or the registrar.'

On the facts of this case, the plaintiff does not deny in Chen's affidavit the defendant's claim that the defendant registered address at Bintang Jaya Commercial Centre where the plaintiff's previous counsel had effected the service of the cause papers was closed or unmanned. The plaintiff also did not deny or aver to the contrary that the previous counsel for the plaintiff, Mr. Bong Ah Loi, had knowledge or would have known that the defendant's registered office at the above address would be closed and untenanted because Mr. Bong Ah Loi's firm was at one time acting for the defendant in another civil suit. Neither had the plaintiff filed an affidavit by Mr. Bong Ah Loi to deny this claim by the defendant. The court cannot ignore this fact. Even though under the rules service of originating process or other court documents on a corporation of company should be done at the registered address of the company or corporation, it is my view that if it is within the knowledge of the solicitor or its firm that is going to effect the service that the registered address of the defendant (as in this case) is closed or unmanned it is incumbent of the solicitor effecting the service to inform the defendant of the service. This is even more so when the defendant claimed that Mr. Bong Ah Loi or his firm had acted for and represented the defendant in another case and was aware of the modus operandi of the defendant. I would venture to say in the circumstance such as this, Mr. Bong Ah Loi or his firm should have declined to act for the plaintiff in this case to avoid any possibility of conflict of interest on the ground that he had once acted for and represented the defendant in another ongoing case in the High Court. As it turn out Mr. Bong Ah Loi and his firm had wisely withdrawn from the case at the *inter partes* hearing.

On the facts I have no difficulty to conclude that the service of the writ is irregular and therefore the default judgment could be irregular. In any event both the default judgment and the order are *ex parte* orders and could be set aside. In this regard I also noted that Chen's affidavit does not contain any explanation or denial about the invoices pleaded in the plaintiff's statement of claim which are disputed by the defendant. So also is the capital payment of RM180,000.

On the garnishee order I am also of the view that issue whether the defendant's money deposited in a current account with the 1st garnishee is a debt owing by the 1st garnishee to the defendant ought to be put to trial.

Having considered all the above factors it would appear that I ought to grant the injunction. However, in the course of the arguments plaintiff's counsel pointed out that Udam @ George Adam Talek who had filed the affidavit in support of the defendant's application has no authority to decide for the

company or move the court because he was no longer the director in the defendant company. He is a mere shareholder in the company. It is well settled principle that a shareholder in a company has no say in the running of the company affairs. This function is the function of the Board of Directors or any one of the directors of the company assigned by the Board of Directors of the company. In *Tai Choi Yu v. Syarikat Tingan Lumber Sdn. Bhd.* [1998] 4 CLJ 293, the Court of Appeal said:

> The law is clear that a mere shareholder a *fortiorari*, a minority shareholder has no interest legal or equitable, in the property of a company (see *Macaura v. Northern Assurance Co. Ltd* [1925] AC 619 at p. 626).

In the same case the court also held that it is settled law that before the court can grant leave to intervene, the applicant must show that he has an interest directly related to the subject matter of the action. The interest in this context is a legal interest and not a mere commercial interest. The court went further to state that a mere commercial interest in outcome of the action is not sufficient. (see also *Syawal Enterprise Sdn. Bhd. & Anor v. Dayadiri Sdn. Bhd.* [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165; *Malaysia Land Investment Co. (Pte) Ltd. v. Sathask Realty Sdn. Bhd. & Ors* [2001] 1 MLJ 451 and *United Investment and Finance Ltd. v. Tee Chin Yong & Ors* [1967] 1 MLJ 31).

In this instant case, it is obvious from the affidavit of Udam @ George Adam Talek that he is the applicant to set aside the garnishee order. But, it has been shown that he is only a shareholder. It is also not in dispute that the money that is the subject of the garnishee order belongs to the defendant company not to Udam @ George Adam Talek. So it is the company property.

The fact that Udam @ George Adam Talek has no authority to give instruction to defendant counsel on behalf on the defendant is not disputed by the defendant counsel. On this consideration alone I should discharge the injunction.

Accordingly I find that the Udam @ George Adam Talek has no local standi to move the court for the injunction on behalf of the defendant and therefore I will discharge the *ex parte* injunction granted on 5 July 2005. Cost of this application to the plaintiff.